Supreme Court, U.S.
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No. 94-649

In The

Supreme Court of the United States

October Term, 1994

KENNETH K. GEORGE,

Petitioner,

v.

BETHLEHEM STEEL CORPORATION,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF OF RESPONDENT BETHLEHEM STEEL CORPORATION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTERSTATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. Whether the granting of a challenge for cause during civil jury selection causes cognizable prejudice to the party opposing the challenge, where the jury ultimately impanelled is fair and impartial.

2. Whether the district court abused its discretion in excluding evidence of employment decisions made by persons not involved in the decision to terminate the plaintiff's employment.

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STATEMENT OF CORPORATE AFFILIATIONS

Pursuant to Supreme Court Rule 29.1, respondent represents (i) that Bethlehem Steel Corporation is not a subsidiary of any corporation, and (ii) that Bethlehem Steel Corporation owns interests in various subsidiaries as set forth in Appendix 1 hereto.

JURISDICTION

The United States District Court for the Eastern District of Pennsylvania had subject matter jurisdiction over this action under 28 U.S.C. § 1331. Jurisdiction of the Court of Appeals was based upon 28 U.S.C. § 1291. This Court's jurisdiction is conferred by 28 U.S.C. § 1254(1).

COUNTERSTATEMENT OF THE CASE

A. Procedural History

The complaint in this action was filed by petitioner Kenneth K. George ("George") on October 15, 1991, in the United States District Court for the Eastern District of Pennsylvania. George asserted a claim against respondent Bethlehem Steel Corporation ("Bethlehem Steel") under Section 4 of the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 623, as amended ("ADEA"). The district court conducted a bifurcated trial in which the issue of the timeliness of George's claim was tried first, followed by a trial on the merits. The jury found during the first phase that George's complaint was timely, but found in the second phase that Bethlehem Steel did not

discriminate against George on the basis of his age. The district court awarded judgment in favor of Bethlehem Steel on the merits in accordance with the jury's verdict.

By judgment order dated July 19, 1994, the Court of Appeals for the Third Circuit affirmed the district court's judgment in favor of Bethlehem Steel. George's Petition for Certiorari (hereafter, "George Pet.") followed.

B. Counterstatement of Facts.

Petitioner Kenneth George was employed by Bethlehem Steel in various accounting positions from 1957 until his termination in 1989. On January 27, 1988, Bethlehem Steel notified George and others working in the Home Office of Bethlehem Steel's Marine Construction Division that their positions were to be eliminated. That decision was made by Robert Funk, President of the company's Steel-Related Group. (Court of Appeals Joint Appendix (hereafter, "Ct. App. Jt. App."), Vol. 5, 336-38; Vol. 6, 357-58). George was offered the position of Controller, Freight Car Division, which he declined on February 1, 1988. (Ct. App. Jt. App., Vol. 7, 482). During the next twenty-one months, George worked on various temporary assignments within Bethlehem Steel, while he searched unsuccessfully for another permanent position within the company. George's employment terminated in October, 1989, at the conclusion of his final temporary assignment.

Bethlehem Steel disagrees with various statements of fact made by George in his Petition for Certiorari. George

suggests that "Bethlehem Steel intentionally failed to provide [George] with alternative employment which Bethlehem Steel provided younger employees." (George Pet. at 13). In fact, all five professional employees affected by the elimination of the Home Office of the Marine Construction Division were in their fifties at the time of the restructuring, and only one of those persons, an engineer, accepted permanent alternative employment within the company.

George asserts that "Bethlehem Steel [followed a] *defacto* policy of promoting and hiring younger employees to the exclusion of older workers." (George Pet. at 13). No such policy existed, and the jury concluded that Bethlehem Steel had not discriminated against George on the basis of his age.

George avers that he "explicitly asked all persons in decision-making positions to inform him of job openings so he could be considered." (George Pet. at 15). The deposition testimony on which George relies for that statement (Ct. App. Jt. App., Vol. 2, 126) was not a part of the trial record, and, in all events, does not support the statement for which it is cited. Moreover, George's assertion is implausible, given the hundreds of persons entrusted with employment decisions within Bethlehem Steel Corporation.

George describes a "Personnel Committee" (George Pet. at 8-9, 12-13) that allegedly adopted a promotion policy which discriminated against older workers. The committee that George describes, however, merely made recommendations, not decisions, on intra-company

assignments of accountants. Moreover, the committee disbanded in 1986, some two years before the decision was made to eliminate the Home Office of the Marine Construction Division.

George repeatedly, and unsuccessfully, sought to show at trial that Lonnie Arnett participated in the decision to terminate George's employment. He avers in this Court (i) that "Lonnie Arnett . . . was employer's corporate controller who was supervising all of employer's accounting positions" (George Pet. at 7-8); (ii) that "Arnett was a key person in the decision to terminate [George] as set forth in employer's termination letter" (George Pet. at 9); and (iii) that "Arnett dictated the employer's retention and promotion policy which discriminated against older employees" (George Pet. at 10). In fact, Mr. Arnett did not supervise all, or even most, of Bethlehem Steel's accounting positions; Arnett had no role in the decision to terminate George other than to advise Mr. Funk, when asked, that there were no open positions in Mr. Arnett's unit (Trial Exhibit P-24); and Mr. Arnett did not dictate Bethlehem Steel's retention and promotion policies.

George argues that "the trial court erroneously decided as a matter of law that Lonnie Arnett was not involved in Bethlehem Steel's decision to terminate [George] . . . . " (George Pet. at 10). That decision by the district court, however, was carefully explained by the district court (Ct. App. Jt. App., Vol. 5, 313-14), and amply supported by record evidence.

Bethlehem Steel also takes issue with parts of George's recitation of the procedural history of the case.

George asserts that he "complained on the record about this *in absentia* process [by which the jury was selected by counsel outside the presence of the trial judge,] which had the effect of giving the employer two extra peremptory challenges." (George Pet. at 6). Most civil juries in the Eastern District of Pennsylvania are selected by counsel without the trial judge or a stenographer present, and George made no objection to that procedure in this case. George did, indeed, complain about the district court's decision to grant two challenges for cause made by Bethlehem Steel, but at no point did George object to the absence of the trial judge during jury selection.

George also suggests that he made a "request for a transcript at time of *voir dire* questions to preserve the jurors [sic] answers for appellate review." (George Pet. at 6). George, in fact, demanded that two prospective jurors who were challenged for cause be asked to re-state their answers to *voir dire* questions on the record, but at no time did George request that *voir dire* as a whole be recorded.

George avers that he "appealed to the United States Court of Appeals for the Third Circuit . . . arguing that the *in absentia* jury selection process was unconstitutional." (George Pet. at 11). George's briefs on appeal described the district court's rulings during jury selection as having been made "*in absentia*," but George did not argue to the court of appeals that the process was for that reason unconstitutional or otherwise defective. Rather, George argued only that the trial court's rulings on Bethlehem Steel's challenges for cause were erroneous on the merits, and that a reconstructed transcript of the questions and answers at issue should have been made.

ARGUMENT

I. Any asserted error during jury selection was either harmless or waived by George; and in all events, the procedures followed by the district court during jury selection were proper.

A. Procedural background.

George's Petition for Certiorari (George Pet. 18-20) argues that the district court denied George due process of law by its decisions during jury selection. *Voir dire* was conducted by counsel in Philadelphia in the presence of a deputy clerk of court and without a stenographer present, pursuant to the normal practice in the district for civil cases. *See Clerk's Office Procedure Handbook for the Eastern District of Pennsylvania*, § XXI(J)(2). At the time of *voir dire*, the district court judge was in Reading, Pennsylvania, awaiting the selection of jurors from the district's central juror pool in Philadelphia. Bethlehem Steel challenged two prospective jurors for cause, one whose claim against his employer for handicap discrimination was then pending in the same court (Ct. App. Jt. App., Vol. 8, 572-73), and another who had had a serious dispute with a former employer about which she consulted an attorney. (Ct. App. Jt. App., Vol. 8, 569-70). The district judge was advised of the basis of the challenges by the deputy clerk by telephone, and sustained both. George then asked to have each of the two excluded jurors repeat their answers for the record. That request was denied by the court, also by telephone. The next day, before the jury was sworn, George renewed his objections to the granting of challenges for cause, and again objected to the court's refusal to order transcription of the excluded jurors'

responses. The court denied the renewed objections, and explained the reasons for its rulings on the record. (Ct. App. Jt. App., Vol. 8, 570-71, 573-74).

B. The granting of a challenge for cause, even if erroneous, causes no prejudice to the party opposing the challenge, so long as the resulting jury is impartial.

This Court long ago established that the decision to grant a challenge for cause, even if erroneous, causes no prejudice to the party favoring retention of the juror, so long as the jurors who ultimately hear the case are fair and impartial. "The right to challenge is the right to reject, not to select, a juror. If, from those who remain, an impartial jury is obtained, the constitutional right of the accused is maintained." *Howard v. Kentucky*, 200 U.S. 164, 174 (1906), quoting, *Brown v. New Jersey*, 175 U.S. 172, 175 (1899). The rule applies equally in civil cases. *Northern P. R. Co. v. Herbert*, 116 U.S. 642, 646 (1886).

The requirements of due process are satisfied by the impanelling of an impartial jury even if the decision to grant a challenge for cause was error:

> [W]hile it is true, as appellant argues, that the Constitution guarantees to an accused the right to a speedy trial by an impartial jury, it does not follow that the rejection of qualified persons for insufficient cause would deprive appellant of that right; or that any useful or legitimate purpose would be served by remanding the case for a new trial before another impartial jury.

Shettel v. United States, 113 F.2d 34, 36 (D.C. Cir. 1940) (footnotes omitted); *see also, United States v. Joseph*, 892

F.2d 118, 123-24 (D.C. Cir. 1989). Various other circuits have acknowledged the same principle. *United States v. Mathews*, 803 F.2d 325, 328-29 (7th Cir. 1986), *rev'd on other grounds*, 485 U.S. 58 (1988); *Vanskike v. ACF Industries, Inc.*, 665 F.2d 188, 207 (8th Cir. 1981), *cert. denied*, 455 U.S. 1000 (1982); *United States v. Calhoun*, 542 F.2d 1094, 1103 (9th Cir. 1976); *United States v. Puff*, 211 F.2d 171, 184-85 (2d Cir.), *cert. denied*, 347 U.S. 963 (1954). *Accord, United States v. Zambito*, 315 F.2d 266, 269 (4th Cir. 1963), *cert. denied*, 373 U.S. 924 (1963). Bethlehem Steel has found no cases holding to the contrary.

George's claim of a due process violation is thus without merit. The case was tried before an impartial jury, and the district court's rulings on Bethlehem Steel's challenges for cause, even if erroneous, caused no prejudice to George.

C. The assignment of error at issue has been waived.

In all events, George has waived the claim of error he makes in this Court. Until his Petition for Certiorari, George never argued that it is error, constitutional or otherwise, for a district judge to rule upon a challenge for cause without observing the veniremen.

In the district court, George opposed Bethlehem's challenges for cause on the grounds (i) that the prospective jurors at issue had affirmed their willingness to decide the case on the basis of the evidence and instructions at trial, and (ii) that the court had failed to order the creation of a transcript of the two prospective jurors' responses. (Ct. App. Jt. App., Vol. 8, 569-74).

George's briefs in the court of appeals noted that the district court made its rulings *in absentia*, but his briefs neither suggested nor argued that the district court's unwillingness to examine prospective jurors in person was error. As was the case in the district court, George argued only that the district court's rulings on Bethlehem's challenges for cause were incorrect, and that the district court erred in failing to order the creation of a transcript, *post hoc*, of the disqualified jurors' responses.

This Court generally will not rule on issues that are raised for the first time on appeal. *Singleton v. Wulff*, 428 U.S. 106, 120 (1976); *Helvering v. Wood*, 309 U.S. 344, 348-49 (1940). George's claim that the trial judge should have been present at *voir dire* has been waived.

D. The procedure by which the jury was selected was procedurally and substantively fair to both parties.

The procedures employed by the district court during jury selection were proper. Under Fed. R. Civ. P. 47(a), the court "may permit the parties or their attorneys to conduct the examination of prospective jurors . . . . " Rule 47(a) does not expressly require the continued presence of the judge during jury selection, and district courts in Pennsylvania have long followed the practice of having counsel conduct *voir dire* in the presence of a deputy clerk but without the trial judge present. *See*, Kerr, "Varieties in Jury Selection Methods," 44 F.R.D. 245, 285-86 (10th Cir. Jud. Conf. 1967) (civil *voir dire*); Local Rule 47.1 of the Western District of Pennsylvania; *cf. Stirone v. U.S.*, 341 F.2d. 253, 255-56 (3d Cir.), *cert. denied*, 381 U.S. 902 (1965)

(upholding use of the same practice in criminal *voir dire*). Similarly, the state courts in New York encourage counsel to conduct *voir dire* in civil cases in the absence of the trial judge, at least where, as here, neither party insists that the trial judge be present at all times during questioning. *See* New York *C.P.L.R.* 4107 (McKinney's 1992).[1]

The trial judge's denial of the plaintiff's request for a transcript was proper, because counsel for the parties were in full agreement about what the prospective jurors' responses had been. (Ct. App. Jt. App., Vol. 8, 569, 571-72). Moreover, a juror's recitation of what he or she said in response to *voir dire* questions is not intrinsically more reliable than the summaries of counsel, to which both sides agreed. In such circumstances, a transcript is unnecessary, and certainly not needed for effective appellate review. Indeed, the Federal Rules of Appellate Procedure expressly contemplate that federal appeals courts may review untranscribed proceedings where counsel have agreed on the contents of the record, Fed. R. App. P. 10(d); and the district court is responsible for declaring the contents of the record where agreement cannot be reached, Fed. R. App. P. 10(c).[2] The district court was

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[1] Bethlehem Steel need not address whether *voir dire* may be conducted in the absence of the trial judge where one party has insisted on the judge's presence during all phases of *voir dire*. This case does not present that issue. Nor does this case involve a question of whether the trial judge must interview jurors as to whom a challenge for cause has been made, because George did not timely request such interviews.

[2] The district court noted on the record that the plaintiff failed to request that *voir dire* be recorded. (Ct. App. Jt. App., Vol. 8, 571).

entirely justified in accepting the parties' fully consistent representations as to what had occurred at *voir dire*, and ruling on that basis.

E. The district court's rulings during jury selection were correct on the merits.

Finally, the trial judge's rulings on Bethlehem Steel's challenges for cause were correct on the merits. The district court has wide discretion in ruling on challenges for cause and will be reversed only if there is a manifest abuse of such discretion. 5A *Moore's Federal Practice*, ¶ 47.07[2], n.4 (2d ed. 1994). A prospective juror's involvement in a dispute similar to that being tried is a proper basis for granting a challenge for cause. *Vanskike v. ACF Industries, Inc., supra*, 665 F.2d at 207; *accord Consolidated Gas & Equipment Co. v. Carver*, 257 F.2d 111 (10th Cir. 1958) (new trial required where one of the jurors who participated in the verdict was a party plaintiff in a similar lawsuit). In this case, the district court carefully articulated the reasons for its rulings (Ct. App. Jt. App., Vol. 8, 570-71, 573-74), and there is no reasonable argument that the district court's decision was an abuse of the broad discretion vested in the district court in ruling on challenges for cause.

II. The district court's order *in limine* involved a routine application of settled law to the facts of this case. Review by this Court of that decision is not warranted.

The district court properly ruled that evidence about other employment decisions made by persons not

involved in the decision to terminate George's employment would not have assisted the jury in resolving George's claim of discriminatory termination. (*See* George Pet. 4a-21a). Such evidence would not have tended to show that Robert Funk, the person who terminated George, intentionally discriminated on the basis of age. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 277 (1989) (O'Connor, J., concurring); *Ezold v. Wolf, Block, Schorr & Solis-Cohen*, 983 F.2d 509, 545 (3d Cir. 1992), *cert. denied*, ___ U.S. ___, 114 S.Ct. 88 (1993); *Fortino v. Quasar Co.*, 950 F.2d 389, 395 (7th Cir. 1991); *Williams v. Williams Electronics, Inc.*, 856 F.2d 920, 925 (7th Cir. 1988).

The district court also correctly ruled that Bethlehem Steel's obligation under the ADEA was to avoid discrimination in the termination decision it actually made, and that the company had no obligation to permit George to "bump" younger employees or otherwise find him alternative employment. *Earley v. Champion International Corp.*, 907 F.2d 1077, 1083 (11th Cir. 1990); *Ridenour v. Lawson Company*, 791 F.2d 52, 57 (6th Cir. 1986); *Sahadi v. Reynolds Chemical*, 636 F.2d 1116, 1117 (6th Cir. 1980); *E.E.O.C. v. United States Steel*, 649 F. Supp. 964, 966 n.1 (W.D. Pa. 1986).

The district court's rulings were well within the bounds of the discretion afforded the trial court in deciding upon the admissibility of evidence. Since the court's rulings on relevance involved only the application of settled law to the special facts of this case, discretionary review of those decisions by this Court is neither necessary nor warranted.

CONCLUSION

For the foregoing reasons, Respondent Bethlehem Steel Corporation respectfully requests that the Court deny George's Petition for Writ of Certiorari.

Respectfully submitted,

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Dated: November 10, 1994

BETHLEHEM STEEL CORPORATION
SUBSIDIARY COMPANIES
Included in the Consolidated Accounts
September 30, 1994

	Name	Organized Under the Laws of	Subsidiary of Company(s)
1	BGA Drill Rig Corporation	Delaware	12
2	Belem-Administracoes e Participacoes Ltda.	Brazil	12
3	BethEnergy Mines Inc.	West Virginia	12
4	BethFargo, Inc.	Pennsylvania	12
5	Bethintermodal, Inc.	Delaware	39
6	Bethlehem Blank Welding, Inc.	Delaware	12
7	Bethlehem Development Corporation	Delaware	12
8	Bethelehem Hibbing Corporation	Minnesota	12
9	Bethelehem Industries Corporation	Delaware	12
10	Bethelehem Rail Corporation	Delaware	12
11	Bethelehem Rail Corporation	Delaware	12
12	Bethelehem Steel Corporation	Delaware	(b)
13	Bethelehem Steel de Mexico, S.A. de C.V.	Mexico	15

14	Bethelehem Steel Export Company of Canada, Limited	Delaware	12
15	Bethelehem Steel Export Corporation	Delaware	12
16	Bethelehem Steel International Corporation	Delaware	12
17	Bethelehem Steel (Thailand) Limited	Delaware	16
18	Bethelehem Structural Products Corporation	Pennsylvania	12
19	BethSystems, Inc.	Delaware	12
20	BETHTRAN, Inc.	Delaware	39
21	Cambria and Indiana Railroad Company	Pennsylvania	12
22	CARRIER EXPRESS, INC.	Delaware	20
23	Chesapeake Energy Services, Inc.	Delaware	12
24	Conemaugh & Black Lick Railroad Company	Pennsylvania	12
25	EGL Steel Inc.	Delaware	12
26	Eagle Nest Inc.	Delaware	3
27	Greenwood Mining Corporation	Pennsylvania	12
28	HPM Corporation	Delaware	3
29	Hibbing Land Corporation	Delaware	12
(c)	Hibbing Taconite Company	Minnesota	(c)
30	IPV Inc.	Delaware	12
31	Interocean Shipping Company	Liberia	12

32	Kenacre Land Corporation	Delaware	12
33	Manufacturers Water Company, The	Pennsylvania	12
34	Marmoraton Mining Company, Ltd.	Delaware	12
35	Mississippi Coatings Limited Corporation	Delaware	12
36	Mississippi Coatings Line Corporation	Delaware	12
37	Patapsco & Back Rivers Railroad Company	Maryland	12
38	Pennsylvania Steel Technologies, Inc.	Pennsylvania	12
39	Philadelphia, Bethlehem and New England Railroad Company	Pennsylvania	12
40	Primeacre Land Corporation	Delaware	12
41	South Buffalo Railway Company	New York	12
42	Steelton & Highspire Railroad Company	Pennsylvania	12

(a) 100% owned unless otherwise indicated.

(b) Parent Corporation; stock held by the public.

(c) A joint venture, 70.3083% owned by Bethelehem Hibbing Corporation, including indirect owners through Hibbing Development Company, a partnership.

BETHLEHEM STEEL CORPORATION
ENTERPRISES NOT CONSOLIDATED
(Interest owned, except where noted or indicated)
September 30, 1994

	Name	Organized Under the Laws of	Percent of Voting Securities
DIRECT OWNERSHIP – (Interest owned by Bethelehem Steel Corporation or a consolidated susidiary)			
50% or Less Owned:			
1	Chiles-Alexander International Inc.	Delaware	2.97 (a)
2	Double G Coatings Company, L.P.	Delaware	50 (j)
3	Double G Coatings, Inc.	Delaware	50 (k)
4	Empreendimentos Brasileiros de Minaracao S.A.-E.B.M.	Brazil	9.898 (b)
5	G&A Limited Partnership III - A	Texas	- (a)(20% owned)
6	Griffin-Alexander International, Inc.	Delaware	40 (a)
7	India Offshore Inc.	Delaware	40 (a)
8	Indiana Pickling and Processing Company, an Indiana General Partnership	Indiana	20 (i)
9	Iron Ore Company of Canada	Delaware	34.51 (c)
10	CENTEC Company, a Joint Venture	Pennsylvania	50 (d)

11	Precision Blank Welding, L.L.C.	Michigan	50 (i)
12	Presque Isle Corporation	Delaware	16.5
13	Scadrill, Inc.	Delaware	19
14	Walbridge Coatings, an Illinois Partnership	Illinois	- (e)(37.5% owned)
15	Rig V Limited Partnership	Delaware	- (a)(27% owned)
Over 50% Owned:			
1	Ontario Iron Company	Minnesota	90 (f)
2	Rig VI Limited Partnership	Delaware	- (a)(78.95% owned)
3	Bethlehem Singapore Private Limited	Singapore	70 (c)

INDIRECT OWNERSHIP–
(Percentage indicated with reference to direct owner's interest)

Carol Lake Company, Ltd.	Canada	100 (g)
Gulf Power Company	Canada	100 (g)
Quebec North Shore and Labrador Railway Company Inc.	Canada	100 (g)
Ratty Metals, Ltd.	Canada	100 (g)
Northern Land Company, Limited	Canada	50 (g)
Schefferville Power Company	Canada	50 (g)

Twin Falls Power Corporation Limited	Canada	49.61 (g)
Mineracoes Brasileiras Reunidias-MBR	Brazil	51 (h)

(a) Owned by BGA Drill Rig Corp.

(b) Owned by Belem-Administracoes a Participacoes Ltda.

(c) Owned by Bethlehem Steel International Corporation.

(d) Owned by Bethlehem Roll Corporation.

(e) Owned by EGL Steel Inc.

(f) Owned by Bethlehem Hibbing Corporation.

(g) Owned by Iron Ore Company of Canada.

(h) Owned by Empreendimentos Brasileiros de Mineracao S.A.-E.B.M.

(i) Owned by IPV Inc.

(j) 49% owned by Mississippi Coatings Limited Corporation, and 1% through Double G Coatings, Inc.

(k) Owned by Mississippi Coatings Line Corporation.

(l) Owned by Bethlehem Blank Welding, Inc.